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No. 81-2258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SALVATORE INCORVAIA,

Respondent,

-against-

HELLENIC LINES LTD.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the workmen's compensation lien of a stevedore-employer should be afforded priority over the claim for attorney's fees, by the plaintiff's counsel, in a personal injury action, brought against a shipowner, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act?
2. Whether this priority of claims is to be construed differently when the shipowner and the stevedore-employer are the same entity?

COMPANIES AFFILIATED WITH PETITIONER

Listing, pursuant to U.S. Sup. Ct. Rule 28.1, 28 U.S.C. 28.1 (1981), of companies affiliated with the Petitioner, Hellenic Lines Ltd.

1. Hellenic American Agencies, Inc.
2. Universal Cargo Carriers
3. Transpacific Carriers Corp.
4. Trade Asia PTE Ltd.
5. Trade Orient Co. Private Ltd.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix. The opinion of Judge Edward Neaher of the United States District Court for the Eastern District of New York, reported at 502 F.Supp. 280 (E.D.N.Y. 1980), appears in the Appendix.

JURISDICTION

This action originated in the United States District Court for the Eastern District of New York. Jurisdiction in the District Court was based upon diversity, 28 U.S.C. 1332 (1976). The amended judgment, which is the subject of this review, was entered by the District Court on December 31, 1980. A Notice of Appeal was filed by plaintiff's counsel on January 28, 1981 in the District Court and entered in the Court of Appeals on January 30, 1981. An opinion and judgment reversing the District Court were filed in the United States Court of Appeals for the Second Circuit on January 5, 1982.

A timely petition for rehearing and suggestion for rehearing en banc was filed. This petition was

accompanied by a brief of Sea Land Services, Inc., as amicus curiae.

Rehearing en banc was denied on March 11, 1982. A Notice of Appeal to the Supreme Court was filed in the U.S. Court of Appeals, Second Circuit, on May 20, 1982. This petition for certiorari is being docketed within 90 days from the denial for rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1976)

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §933 (a), (b), (e) (1976)

§933 (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

§933 (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

§933 (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

STATEMENT OF THE CASE

The petitioner, Hellenic Lines Ltd. (a vessel owner and the stevedore-employer of the respondent), maintains that the employer's compensation lien has priority over a claim for attorney's fees on any amount recovered by the longshoreman in a third party suit against the vessel owner. Petitioner further contends that where, as here, the shipowner and the stevedore are the same entity, the compensation lien must be afforded priority.

In reliance upon what it perceived to be the principles established by the Longshoremen's and Harbor Workers' Compensation Act, the Second Circuit, in the decision below, held that, in all instances, the claim for attorney's fees has priority. It is respectfully submitted that the Second Circuit's

ruling conflicts in principle with the decisions of this Court; the decision of another Circuit; and the so-called "American" rule.

This action was instituted by a longshoreman, Salvatore Incorvaia, against the defendant, Hellenic Lines Ltd., in its capacity as a shipowner, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1976). The plaintiff sought damages for personal injuries sustained while working aboard the defendant's vessel. The defendant, Hellenic Lines Ltd., simultaneously functioned, at that time, as a stevedore. In this latter role, Hellenic employed the plaintiff.

Following a jury verdict, judgment was entered for plaintiff in the amount of $17,150. Pursuant to the provisions of the Longshoremen's and

Harbor Workers' Compensation Act, plaintiff had previously been paid $13,544.91 in compensation and medical benefits by Hellenic Lines Ltd.

Thereafter, Hellenic Lines asserted a lien against the recovery in the amount of the workmen's compensation benefits. Plaintiff's attorney also claimed against the recovery for attorney's fees of 40% plus disbursements, based upon his retainer with the plaintiff. Plaintiff's counsel moved for an order directing payment of his fee in the amount of $7,109.36. He asserted priority over the compensation lien.

The District Court denied the plaintiff's motion and held that the compensation lien had priority over the claim for attorney's fees. The U.S. Court of Appeals for the Second Circuit reversed, stating that the

claim for attorney's fees had priority over the compensation lien.

It should be noted that irrespective of the relative priority of these liens, in applying the formula of either Court, the plaintiff will not receive any money from this third party action.

A timely petition for rehearing and suggestion for rehearing en banc (accompanied by a brief of Sea Land Services, Inc., as amicus curiae) was denied. Petitioner here seeks writ of certiorari pursuant to 28 U.S.C. 1254 (1). The jurisdiction in the U.S. District Court, Eastern District of New York, was based upon 28 U.S.C. 1332.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISION OF THIS COURT IN BLOOMER v. LIBERTY MUTUAL INSURANCE CO.

The Second Circuit's decision below is in direct conflict with the decision of this Court in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980). Bloomer examined the question of whether a stevedore-employer, who had made compensation payments to a longshoreman for an injury he sustained on a vessel, would be required to share the litigation expenses of the longshoreman's suit. Specifically, would the employer be required to pay a proportionate share of the attorney's fee for the longshoreman's counsel.

It was argued in Bloomer that, in certain circumstances, the Court should exercise its equitable powers and assess against the lienholder a proportionate share of the expenses of suit. The rationale advanced was that an attorney, who creates a fund for the benefit of another, is entitled to reasonable compensation. In other words, a "common fund" should be made available to permit an employee to recover these expenses from the stevedore.

The Court rejected this argument, by holding that when measured against the language, structure and history of the Longshoremen's and Harbor Workers' Compensation Act, the stevedore is not required to share in the longshoreman's litigation expenses.

Simply put, the Bloomer Court viewed the Congressional intent as an

adherence to the uniform rule that the longshoreman's legal fees would be paid by the longshoreman alone. The Court was "unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation and to insure conservation of the legal expenses of stevedores and their insurers. . . ." 445 U.S. at 86.

Contrastingly, in the instant action, the Court of Appeals, Second Circuit, held that: "the legislative history of the LHWCA, leads to a conclusion that the compensation lien applies only to the longshoreman's net proceeds from the negligence suit, after deduction of litigation expenses and a reasonable attorney's fee". Incorvaia v. Hellenic Lines Ltd., ____ F.2d ____ (2d Cir. 1982) (See opinion

in Appendix at 4).

The Court of Appeals herein agreed with the District Court that the common fund doctrine provides no support for priority of the attorney's lien "where the shipowner and the stevedore are the same entity". (See opinion in Appendix at A9-10)Where the appellate panel, however, differed with the District Court was in the interpretation to be afforded to the legislative history and to the judicial precedents to the statutory scheme. Specifically, petitioner submits that the Second Circuit misapplied the concept of "net recovery". The "net recovery" should, in petitioner's view, encompass only the amount remaining after the satisfaction of the compensation lien. It is respectfully submitted that it is

in this interpretation that the Second Circuit departed from the principle laid down in Bloomer and failed to adhere to the uniform rule that the "longshoreman's legal fees would be paid by the longshoreman alone".

The dissent in Melvin v. Strachan, 327 F.2d 83 (5th Cir. 1964), put it succinctly when it stated:

> I suppose we could overlook allowance of extraordinary compensation to a lawyer despite the fact that the legal services conferred no benefit or even were a detriment to his only client, if somewhere in this vague picture one could find that the lawyer did perform valuable services for someone, whether his client or not. But it is going too far too fast to suppose that while the employer may recoup part or all of his compensation payments

> out of the recovery, the suit was in any sense instituted in his behalf, or for his benefit or, for that matter, he wanted it at all.

327 F.2d at 90 (5th Cir. 1964)

If the rule announced in Incorvaia provided some incidental benefit to plaintiff's counsel while accomplishing a liberal application of the Longshoremen's and Harbor Workers' Compensation Act in favor of the injured maritime worker, there might be some justification for the judicial construction given by the Second Circuit. Unfortunately, the rule announced works against the injured worker and subordinates his interests to those of a lawyer with a contingent fee.

Therefore, the decision of the Second Circuit herein conflicts in

principle with Bloomer and warrants review by this Court.

II

THE DECISION OF THE SECOND CIRCUIT IS IN CONFLICT WITH THE RECENT DECISION OF THE FIFTH CIRCUIT IN LEBLANC v. PETCO, INC.

Prior to Bloomer, the U.S. Court of Appeals for the Fifth Circuit had also considered this question of the conflicting claims for attorney's fees and the compensation carriers' assertions of their liens. The decisions of that Circuit had addressed factual situations where the recovery was both sufficient, and insufficient, to satisfy these claims. See, Haynes v. Rederi A/S Aladin, 362 F.2d 345 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967); Chouest v. A & P Boat Rentals, 472 F.2d 1026 (5th Cir. 1973); Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978).

These decisions shared the view that where the reimbursement of the employer's compensation carrier is achieved through the efforts of plaintiff's counsel, a reasonable fee for plaintiff's counsel may, if necessary, be levied for recovery of the compensation.

Without expressly overruling these decisions, the Fifth Circuit in LeBlanc v. Petco, Inc., 647 F.2d 617 (5th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 644 (1982), adopted a different view. In LeBlanc, the Fifth Circuit reversed the trial court's award of attorney's fees and adhered to Bloomer. The Court of Appeals held that:

> Subsequent to the trial court's decision, the United States Supreme Court held in Bloomer v.

> Liberty Mutual Insurance Co. . . .that under the Longshoremen's and Harbor Workers' Compensation Act. . .no such reduction in the compensation lien is to be made. Accordingly, the trial court erred in reducing American Home's compensation lien for a portion of LeBlanc's attorney's fees.

647 F.2d at 618-619.

This conflict in the Circuits further justifies the granting of this petition.

III

THE OPINION BELOW CONFLICTS WITH THIS COURT'S DECISION IN ALYESKA PIPELINE SERV. v. WILDERNESS SOCIETY

As previously noted, the Court of Appeals, Second Circuit, agreed with the District Court that the common fund doctrine was inapplicable as a basis for the awarding of attorney's fees. Clearly, there is no statutory authority for such an award under the Longshoremen's and Harbor Workers' Compensation Act. Therefore, this Court's decision in Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240 (1975) is the only other source of authority for the awarding of attorney's fees. Alyeska set forth two exceptions to the "American" rule that each party should bear its own counsel fees. The factual situation in this case does not embrace either of these two exceptions. In

particular, one of the exceptions was, in fact, rejected by Bloomer.

Therefore, this Court should review this matter in order to reinforce its adherence to the "American" rule on awarding attorney's fees.

IV

HELLENIC LINES LTD'S. UNIQUE STATUS AS A SHIPOWNER AND STEVEDORE-EMPLOYER DEMANDS THAT THE COMPENSATION LIEN BE GIVEN PRIORITY OVER ANY CLAIM FOR ATTORNEY'S FEES

The District Court below recognized the unique status of Hellenic as a shipowner that also functioned as its own stevedore. Accordingly, that Court required that the compensation lien be afforded priority over the claim for plaintiff's attorneys' fees.

The District Court further recognized that if Hellenic Lines as stevedore was statutorily assigned the plaintiff's cause of action, it could not sue itself, as vessel owner, for negligence; nor avail itself of the Section 933 (b) defense under the Act. There is an inherent conflict of interest. See, Czaplicki v. SS Hoegh Silver Cloud, 351 U.S. 525 (1956).

Because of Hellenic Line's business structure, its relationship to an injured employee as a defendant in a third party law suit was analogous to that of the stevedore as a third party defendant prior to the 1972 Amendments to the Act. Under the old law, the stevedore indirectly paid any plaintiff-longshoreman's judgment if it breached its warranty of workmanlike performance. The District Court compared the dire result as follows:

> Accordingly, it was the view of the pre-1972 amendment decisions that to impose a fee in such a case was to charge the stevedore for the privilege of being sued. . .It is true that Hellenic Lines, as employer and self-insurer, will not in any real sense recoup its compensation payments out of the recovery against Hellenic Lines as

> self-insured vessel owner. Since such a "recoupment" would in reality be little more than the transfer of funds from one pocket to another, it cannot be said that the employer here derives a benefit as an incident of plaintiff's attorney's efforts. . .In the light of all the foregoing, this case boils down to one where the court is being asked to compel defendant to pay "for the privilege of being sued" in an action where no benefit will inure to either the stevedore or the injured longshoreman himself.

(See District Court Opinion in Appendix at A31-35; 502 F. Supp. 280, 282-83 (1980).

The Second Circuit was not unmindful of this problem in deciding the matter below when it stated that:

> If we were to pursue that inquiry, we would agree with Judge Neaher that Hellenic's decision to perform its own stevedoring services

> creates a conflict of interest similar to what existed before the Ryan indemnity action was abolished.

(See Court of Appeals Opinion in Appendix at A-15).

Therefore, even if the claim for attorney's fees were to be given priority, the equities and uniqueness of the instant action, where the shipowner and the stevedore are the same entity, mandate that the compensation lien be afforded priority.

V

THE QUESTION IS SUBSTANTIAL AND MERITS REVIEW

The question of the priority of the workmen's compensation lien as opposed to a claim for attorney's fees is a novel and substantial one. It has never been squarely addressed by this Court. The Court has recognized the existence of this question in Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74, 86 n.13 (1980):

> We do not today address the Valentino situation, and contrary to the implication of the dissent, nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses.

Contrastingly, Mr. Justice Blackmun, in his dissenting opinion, commented that:

> I shall be interested to see whether the

> Court adheres to its present logic when presented with a case where the third-party recovery is so small that virtually nothing is left for the longshoreman. Where the recovery against the shipowner is less than the stevedore's lien and the expenses of the suit, see ante, at 86-87, n.13, 63 L Ed 2d, at 226, it is to be hoped that the injured longshoreman will not be required to disgorge part of his compensation payments. Yet such disgorgement would not be inconsistent with the gloss on congressional priorities that the Court imposes today.

445 U.S. at 96.

The Court's resolution of this question will have broad ramifications. It will define the relative rights of the three claimants to the proceeds of a recovery in a third party action, in an actively litigated area and

provide much needed guidance to the lower Courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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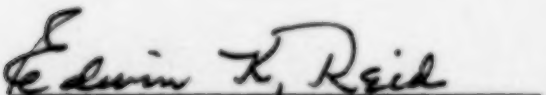

Of Counsel for Petitioner
Edwin K. Reid

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32 -- August Term, 1981

Argued: September 3, 1981

Decided: January 5, 1982

Docket No. 81-7099

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SALVATORE INCORVAIA,

Plaintiff-Appellant,

v.

HELLENIC LINES LTD.,
"Grigorios C-IV",

Defendant-Appellee.

----------X

UNITED STATES COURT OF APPEALS
FILED
JAN. 5, 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Before: NEWMAN and KEARSE, Circuit Judges, and EGINTON,* District Judge.

*The Honorable Warren W. Eginton of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from a judgment of the District Court for the Eastern District of New York (Edward R. Neaher, Judge) according a stevedore's compensation lien priority over a longshoreman's attorney's lien for fees in a negligence action when the shipowner and the stevedore are the same entity.

Reversed and remanded.

Irving Bushlow, Brooklyn, N.Y., for plaintiff-appellant.

Robert Alexander Hulten, New York, N.Y. (Edwin K. Reid, Zock, Petrie, Reid & Curtin, New York, N.Y., on the brief), for defendant-appellee.

NEWMAN, Circuit Judge:

The trilateral relationship among longshoreman, stevedore, and shipowner generates an apparently limitless array of legal issues. In Valentino v. Rickners Rhederei, G.M.B.H., SS Etha, 552 F.2d 466 (2d Cir. 1977), a longshoreman's negligence action against a vessel owner, we considered whether the lien of the longshoreman's attorney for his fee has priority over the stevedore's lien for its workmen's compensation payments when the recovery in the negligence action is insufficient to satisfy both liens. Having resolved that issue in favor of the attorney's lien, we now find the same issue recurring with the slight variation that in this case the shipowner provides its own stevedoring services. The District Court

for the Eastern District of New York (Edward R. Neaher, Judge) concluded that this variation requires according priority to the compensation lien. We disagree and therefore reverse.

Plaintiff-appellant, a longshoreman, was injured while working aboard a vessel owned by defendant-appellee Hellenic Lines. Since Hellenic Lines provides its own stevedoring services, Hellenic, as stevedore-employer, paid plaintiff $13,544.91 in compensation for his injury. Thereafter, plaintiff sued Hellenic in its capacity as shipowner and recovered a verdict of $17,150 against which Hellenic asserted its compensation lien in the amount of $13,544.91. Plaintiff's attorney, relying on Valentino, applied to receive his fee of $7,109.36 as a first charge against the judgment.

The District Court gave priority to Hellenic's compensation lien and awarded plaintiff's attorney $3,595.09 -- the remainder of the judgment after deducting the stevedore's compensation lien. Judge Neaher pointed out that Valentino had based priority of the attorney's lien partially on the common fund doctrine, the equitable principle that one who creates a fund for the benefit of others is entitled to be paid from that fund, see Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). That principle, Judge Neaher concluded, is inapplicable to this case, where the shipowner and the stevedore are the same entity, because the attorney's efforts will never create any benefit for the stevedore: whatever dollars it recoups for its compensation lien are being

paid by it as defendant in the negligence action.

Judge Neaher also pointed out that prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. (1976), the longshoreman's negligence suit usually conferred no benefit on the stevedore, but instead exposed it to substantial third-party liability in an indemnity action brought by the vessel owner. See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). The existence of the Ryan indemnity action created a conflict of interest between longshoreman and stevedore that led some courts to rule that the stevedore's compensation lien was to be satisfied in full before the lien of the longshoreman's attorney. Spano

v. N.V. Stoomvaart Maatschappij "Nederland", 340 F. Supp 1194 (S.D. N.Y. 1971); Russo v. Flota Mercante Grancolombiana, 303 F. Supp. 1404 (S.D.N.Y. 1969). In Valentino we concluded that abolition of the Ryan indemnity action required disapproval of Spano and Russo. 552 F.2d at 470. In this case, however, Judge Neaher thought that the identity between the vessel owner and the stevedore created a conflict of interest between longshoreman and stevedore similar to the situation that existed prior to the 1972 Amendments and similarly called for priority for the compensation lien.

We agree with the District Court that the common fund rationale provides no support for priority of the attorney's lien when the shipowner and the stevedore are the same entity.

However, in light of the Supreme Court's opinion in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980), we conclude that priority for the attorney's lien, in both the Valentino situation and the case before us, is supported directly by the statutory scheme of the LHWCA and its legislative history.

Unlike the issue we face here concerning the priority of the compensation lien, the issue before the Supreme Court in Bloomer was the amount of the lien. Specifically, the issue was whether, in the typical three-party situation, the amount of the compensation lien should be reduced by a proportionate share of the longshoreman's legal fees and expenses. In Bloomer, both the stevedore and the longshoreman agreed

that expenses, including legal fees, were first charges against the negligence recovery, 445 U.S. at 76 n.2. The longshoreman's claim was that his net recovery (negligence judgment less attorney's fee and expenses) should be increased by a proportionate share of the attorney's fee and expenses, with the increase supplied by a corresponding decrease in the compensation lien.[1] Though the issue before us differs from the issue in Bloomer, we think the Supreme Court's approach to the problem, and particularly its analysis of the legislative history of the LHWCA, leads to a conclusion that the compensation lien applies only to the longshoreman's net proceeds from the negligence suit, after deduction of litigation expenses and a reasonable

attorney's fee.

First, the Court pointed out that the purpose of the judicially recognized subrogation claim of the stevedore to recoup its compenstion payment from the longshoreman's negligence judgment was to prevent double recovery by the longshoreman. Id. at 79. That purpose would be partially undermined if the longshoreman could increase his net recovery by receiving from the stevedore a proportionate share of the legal fee and expenses incurred in the negligence suit. The longshoreman's net recovery, the Court concluded, must remain fully available to the stevedore's compensation lien, without diminution of that lien, but this reasoning recognizes that the compensation lien operates only upon the

longshoreman's net recovery.

Second, the Court observed that Congress, in amending the LHWCA in 1959 to eliminate all aspects of the longshoreman's election between compensation and negligence remedies, understood that the compensation lien operated only upon the longshoreman's net recovery in the negligence action. "[A]n employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery." S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959) (emphasis added), reprinted in [1959] U.S. Code Cong. & Ad. News 2134, 2135; see 445 U.S. at 81.[2] Moreover, as the Court pointed out, the House version of the 1959 amendment explicitly provided that the stevedore's lien on recovery from a third person came

"after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery," H.R. Rep. No. 229, 86th Cong., 1st Sess. 6 (1959) (italics omitted); the House passed this version, 105 Cong. Rec. 5561-62 (1959), but accepted the Senate version, 105 Cong. Rec. 15343 (1959), apparently satisfied that this version adequately continued existing judicial practice, 445 U.S. at 81-82 n.6. That practice included recognition of the fact that "[t]he expenses of securing the recovery is, as in equity it should be, a first charge against the fund itself." Fontana v. Pennsylvania R.R., 106 F. Supp. 461, 464 (S.D.N.Y. 1952) (Weinfeld, J.), aff'd sub nom. Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), cert. denied, 346 U.S.

886 (1953).[3]

With the stevedore's compensation lien thus understood to reach only the longshoreman's net recovery in the negligence action, we see no reason to enlarge its scope to reach the gross amount of the recovery simply because in this case the shipowner is also the stevedore. The Supreme Court has recognized that Congress, in authorizing the longshoreman's negligence action, intended "that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself." Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266 (1979). In Valentino, we pointed out that

permitting the compensation lien to come ahead of the attorney's lien would deter counsel from pressing longshoremen's claims on a contingent fee basis except "where a recovery substantially in excess of the amount of the stevedore's lien is a virtual certainty." 552 F.2d at 469. We were unwilling to accept such deterrence in Valentino, and that concern remains just as valid when the shipowner and the stevedore are the same entity.

Since we view the compensation lien as reaching only the net proceeds from the negligence suit, we do not find decisive, as did many of the pre-1972 cases, whether the longshoreman's attorney has created a fund for the benefit of the stevedore of whether a conflict of interest between longshoreman and stevedore precludes the

"common fund" approach. If we were to pursue that inquiry, we would agree with Judge Neaher that Hellenic's decision to perform its own stevedoring services creates a conflict of interest similar to what existed before the Ryan indemnity action was abolished. However, the situation is not identical and does not require revival of the approach to attorney's fees taken in Spano and Russo. When the indemnity action existed, the stevedore had to pay not only compensation but also its own attorney's fee in defending against the shipowner's suit. That legal fee had been explicitly relied upon as one reason for giving the compensation lien priority over the attorney's fee of the longshoreman. Riddick v. Rederi A/B Fredrika, 271 F. Supp. 360, 360-61

(E.D. Va. 1967). However, Hellenic incurs only the legal fee to defend itself as vessel owner in the negligence action; it incurs no extra fee to defend a Ryan indemnity suit. Moreover, when the shipowner acts as its own stevedore, it may elect not to self-insure, in which event the compensation carrier, which has its own subrogation right, 33 U.S.C. §933 (h) (1976), is not adverse to the longshoreman and stands to benefit from the net negligence recovery. Now that Valentino has limited the compensation lien to the longshoreman's net recovery since the 1972 Amendments (whether or not it was so limited before, see Strachan Shipping Co. v. Melvin, 327 F.2d 83 (5th Cir. 1964)), we think that, in keeping with Edmonds, the scope of the lien should

not be varied by the happenstance of whether the stevedore and the vessel owner are the same, or whether the combined entity has a separate compensation carrier, or other factors irrelevant to the incentive of the longshoreman's attorney to bring the negligence action authorized by the Act. There are enough litigable issues in this area without opening up a new inquiry in each case as to whether the Valentino rule should be altered.[4]

Though Hellenic, as stevedore, views itself, like Ryan indemnitors, as being asked to pay the longshoreman's attorney for the privilege of being sued, it is more realistic to view Hellenic, as shipowner, to be paying the attorney because it was negligent toward his client. Moreover, the duty of care owed the longshoreman is

unaffected by the fact that Hellenic as shipowner elected to be its own stevedore. The mechanisms for securing compensation for breach of that duty should also be unaffected by Hellenic's preference not to contract for stevedoring services. Those mechanisms include a compensation lien limited to the net proceeds of the longshoreman's negligence recovery, after deduction of a reasonable attorney's fee and expenses.

The judgment is reversed and remanded for entry of a judgment consistent with this opinion.

FOOTNOTES

1. The proportionate share reduction, as claimed by the longshoreman, was calculated by reducing the amount of the compensation lien by the ratio that the attorney's fee and expenses bore to the total negligence judgment.

2. The Court also noted that "Congress did not intend to alter the rule allowing the stevedore to recover the full amount of its lien from the longshoreman's third-party recovery." 445 U.S. at 80-81. Since the very next sentence in the opinion quotes from the Senate Report's reference to an employer's reimbursement from "net" proceeds of the recovery, it seems evident that recovering the "full amount" of the compensation lien means use of the net proceeds, when they are sufficient to pay the compensation lien

in full, undiminished by the pro rata portion of the attorney's fee that Bloomer sought for himself.

3. Fontana concerned only the issue, ultimately resolved in Bloomer, whether the compensation lien should be reduced by a pro rata share of the attorney's fee as a first charge upon the negligence award. See Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026, 1034 n.13 (5th Cir.), cert. denied, 412 U.S. 949 (1973). Subsequent cases relied on Fontana not only to disallow pro rata decrease of the compensation lien when the negligence award was large enough to cover both the attorney's fee and the compensation lien, Davis v. United States Lines Co., 253 F.2d 262 (3rd Cir. 1958); In re Sheffield Tankers Corp., 222 F. Supp. 441 (N.D. Cal.

1963); Oleszczuk v. Calmar S.S. Corp., 163 F. Supp. 370 (D. Md. 1958), but also to give priority to the compensation lien when the negligence award was too small to cover both the lien and the attorney's fee, Haynes v. Rederi A/S Aladdin, 362 F.2d 345, 350-51 (5th Cir. 1966) (noting stevedore's employment of its own attorneys to protect its lien), cert. denied, 385 U.S. 1020 (1967); Spano v. N.V. Stoomvaart Maatschappij "Nederland", supra; Russo v. Flota Mercante Grancolombiana, supra.

4. Of course, the reasonableness of the attorney's fee may be challenged, lest it encroach unduly on the net proceeds subject to the compensation lien. The fee of approximately one-third of a modest verdict has not been challenged as unreasonable in this

case. By contrast, the examples offered by Judge Brown to illustrate undesirable consequences of the Fifth Circuit's pre-1972 decision to limit the compensation lien to the net recovery are premised on a 40% attorney's fee applied to substantial recoveries. Strachan Shipping Co. v. Melvin, supra, 327 F.2d at 89 n.9, 90 n.11, 93 n.20 (Brown, J., dissenting.)

KEARSE, Circuit Judge (concurring):

UNITED STATES COURT OF APPEALS
FILED
JAN. 5, 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

While I believe the granting of priority to the attorney's lien produces an inequitable result when the shipowner is its own stevedore and the suit yields less than the amount the defendant has already paid the longshoreman as compensation plus the fees of the attorney to bring suit, I concur in the judgment on the basis of the legislative history of the 1959 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 86-171, 73 Stat. 391 (amending 33 U.S.C. §933), discussed in the majority opinion, ante, which suggests that Congress

intended the attorney's lien to have priority.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

SALVATORE INCORVAIA, :

Plaintiff, : 77 C 94

-against- :

HELLENIC LINES, LTD., :

"GRIGORIOS-C-IV," :

Defendant. :

----------x

MEMORANDUM ORDER

Following a jury verdict in this action brought under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. §§901 et seq. ("the Act"), judgment was entered for plaintiff in the amount of $17,150 for injuries received while he was working on defendant's vessel. Prior to trial, plaintiff had been paid $13,554.91 in compensation and medical benefits by his employer, who now claims

a lien in that amount against the recovery. Plaintiff's attorney also claims $7,109.36 against the recovery for his fee and disbursements and has applied to the court for an order directing defendant to make such payment.

This case is unusual in that the defendant vessel owner was also plaintiff's employer.[1] Thus, the question arises whether an employer's compensation lien takes precedence over a plaintiff's attorney's lien where the self-insured vessel employed the longshoreman and the recovery is not sufficient to fully satisfy both liens. For the reasons which follow, the court is of the opinion that under the circumstances of this case the employer's lien is to be accorded priority.

The statutory scheme governing the work-related injuries of longshoremen was the subject of sweeping amendments

in 1972. Briefly outlined, the Act entitles a longshoreman to prompt compensation and medical payments from his stevedore-employer for injuries occurring on the navigable waters of the United States. 33 U.S.C. §§901 et seq. The longshoreman may also bring an action for negligence against the third-party owner of the vessel on which the injury occurred. Id. §933(a). Any recovery in that suit is subject to the stevedore's judicially created lien in the amount of compensation and medical payments previously made. See Bloomer v. Liberty Mutual Ins. Co., ___ U.S.___, 100 S.Ct. 925, 928 (1980). If the longshoreman fails to bring such an action within six months of receipt of the compensation award, his claim is then assigned to the stevedore. 33 U.S.C. §933(b). See Rodriguez v. Compass Shipping Co. Ltd., 617 F.2d 955 (2d Cir.),

cert. granted, 49 U.S.L.W. 3211 (October 6, 1980). Although the Act provides for distribution of a recovery obtained in the stevedore's assigned action, id. §933(e)[2], it is silent regarding the distribution of a judgment obtained by the longshoreman himself against the vessel owner, and in such situations the courts are called upon to fashion rules that complement the statutory scheme and accord with the equities of the parties. See, e.g., Cella v. Partenreederei MS Ravenna, 529 F.2d 15,20 (1st Cir. 1975), cert. denied, 425 U.S. 975 (1976).

The Court of Appeals for this Circuit in 1977 laid down a rule for the priority of liens in a case involving the usual context of a longshoreman's action under the amended Act -- where the vessel owner and the stevedore-employer are distinct entitles and the latter is not a party to the suit. In

Valentino v. Rickners Rhederei, G.M.B.H., 552 F.2d 466 (2d Cir. 1977), it was held that the longshoreman's attorney's lien has priority over the employer's compensation lien, with the longshoreman, who had already collected compensation payments, receiving whatever may remain. See Bloomer v. Liberty Mutual Ins. Co., supra, 100 S.Ct. at 932 n.13. This priority scheme prevails even where the recovery is insufficient to satisfy the liens of both the attorney and the employer and may result in the longshoreman himself receiving nothing out of the judgment. Valentino, supra, 552 F. 2d at 467-68 & n.2.

The rationale for this decision was based upon the

> "well-established principle of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts. Sprague v. Ticonic Nat'l Bank,

> 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026 (5th Cir.) (Wisdom, J.), cert. denied, 412 U.S. 949, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973)."
> Valentino, supra, 552 F.2d at 468-69.

Thus, it is equitable to charge the employer with the expenses of securing the recovery out of which he receives the benefit of recoupment of compensation payments previously made. In addition, the court noted that if the employer had instituted the action against the vessel owner, pursuant to the statutory assignment of the longshoreman's claim, it would constitute a first lien on the recovery. The court saw no valid reason for departing from the statutory scheme set forth in 33 U.S.C. §933(e) and directing a different result when the longshoreman pursues his own statutory remedy than when the stevedore-employer does so for him. Id.

The court in Valentino also relied on the fact that prior to the 1972 amendments, a vessel owner sued by a longshoreman was permitted to being a third-party action against the employer seeking indemnity for any judgment secured by the injured longshoreman. See Ryan Stevedoring Co. v. PanAtlantic S.S. Corp. 350 U.S. 124 (1956). Under those circumstances, the longshoreman's suit conferred little or, more usually, no benefit upon the employer because it exposed him to substantial third-party liability. "The net result in most cases was that the stevedore became liable without fault for injuries to its employees." Valentino, supra, 552 F.2d at 468. See Swift v. Bolton, 517 F.2d 368, 369-79 (5th Cir. 1975). Accordingly, it was the view of the pre-1972 amendment decisions that "to impose a fee in such a case was to charge the stevedore for the

privilege of being sued." Valentino, supra, 552 F.2d at 470. Since the longshoreman and his employer had conflicting interests, see Swift v. Bolton, supra, 517 F.2d at 369-70, discussing Ballwanz v. Jarka Corporation of Baltimore, 382 F.2d 433 (4th Cir. 1967); but compare Chouest v. A & P Boat Rentals, Inc., supra, 472 F.2d at 1032, the equitable principle embodied in Sprague v. Ticonic Nat'l Bank, supra, was considered inapplicable.

The 1972 amendment, however, abolished the vessel's right to indemnity and vested the longshoreman and his employer with common interests arising out of the fact that the greater the former's recovery against the vessel the greater the change that the compensation lien would be satisfied in full. The effect of this realignment, later incorporated into the rationale of the Court of

Appeals in Valentino, had been described by the district court below:

> "The 1972 amendments mean that there is an undeniable benefit to the stevedore. A res is created out of which a fee can reasonably be paid." Valentino v. Rickners Rhederei G.M.B.H., 417 F. Supp. 176, 181 (E.D.N.Y. 1976). (Emphasis supplied.)

In the case at bar, although there exists a somewhat different divergence of interests between the longshoreman and his employer than in the pre-amendment cases, defendant argues that it nonetheless finds itself in the awkward position of being asked to underwrite a lawsuit from which it cannot hope to benefit. It is true that Hellenic Lines, as employer and self-insurer, will not in any real sense recoup its compensation payments out of the recovery against Hellenic Lines as self-insured vessel owner. Since such a "recoupment" would in reality be little more than the trans-

fer of funds from one pocket to another, it cannot be said that the employer here derives a benefit as an incident of plaintiff's attorney's efforts. Rather, the circumstance that the vessel owner is also employer makes this case more similar to the pre-amendment situations where the longshoreman and his employer were considered to have had adverse interests.

Nor is it clear that this is a case where the court's decision may be guided by the explicit statutory provision for distribution of a recovery obtained in an action brought by the stevedore-employer. 33 U.S.C. §933(e). Even if plaintiff had failed to bring suit within six months and his claim had been statutorily assigned, Hellenic Lines, as assignee-employer would have been unable to pursue a claim for recoupment against itself -- Hellenic Lines as vessel owner.

See Czaplicki v. The S.S. Heogh Silvercloud, 351 U.S. 525 (1956).[3]

In light of all the foregoing, this case boils down to one where the court is being asked to compel defendant to pay "for the privilege of being sued" in an action where no benefit will inure to either the stevedore or the injured longshoreman himself. It is the court's view that a rigid application to the facts of this case of the rule announced for the Valentino situation would do violence to the very equitable principles that were considered to require the result reached by the Court of Appeals in that case. Nor are we able to believe this would be in keeping with the intent of the 1972 amendments to reduce the potential liability and considerable legal expenses of employers "to assure that stevedores would have sufficient funds to pay vastly increased compensa-

tion benefits to longshoremen." Bloomer v. Liberty Mutual Ins. Co., supra, 100 S.Ct. at 930-32 & n.11.[4]

At the same time, the court is mindful that it is the aim of the Act to provide longshoremen with workers' compensation without depriving them of their right to be made whole for their injuries by negligent third parties, and without eliminating the incentive for third parties to provide longshoremen with a safe place to work. We would therefore not want to produce a result that might tend to "discourage counsel from pressing longshoremen's claims on a contengent fee basis in all cases, save those where a recovery substantially in excess of the amount of the stevedore's lien is a virtual certainty." Valentino, supra, 552 F.2d at 469. On the facts of this case, however -- and particularly since the excess of the recovery over

the compensation lien will allow an attorney's fee that is far from nominal -- we cannot say that today's decision will unfairly discourage the bringing of longshoremen's actions. Moreover, unlike Valentino, this case presents compelling equitable reasons why the attorney's lien should not be granted priority.

Accordingly, plaintiff's attorney's application is denied. Hellenic Lines is directed to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien.

SO ORDERED.

The Clerk of the Court is directed to enter judgment in accordance with this memorandum order and to forward copies of this memorandum order to counsel for the parties.

_____

U.S.D.J.

Dated: Brooklyn, New York
November 7, 1970

[1] Where the longshoreman is employed by the vessel, the Act allows an exception to the general rule that an employee who has received compensation benefits from his employer may not bring an action against the latter. Reflecting settled case law, however, see Edmonds v. Compagnie Generale Transatlantique, ___ U.S. ___, 99 S.Ct. 2753, 2758-89 & n.13, and Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976), 33 U.S.C. §905(b) permits an action only for injuries not "caused by the negligence of persons engaged in providing stevedoring services."

[2] Out of the recovery against the vessel owner in such an action, the stevedore-employer retains his costs of litigation, including a reasonable attorney's fee, and the amounts of compensation and medical payments previously paid to the longshoreman. Of any excess, four fifths shall be paid to the longshoreman, and one fifth "shall belong to the employer." 33 U.S.C. §933(e).

[3] Since plaintiff here did timely institute his action, of course, the question is not presented, and we express no opinion, regarding whether under these circumstances there could be an exception to the statutory assignment of claim. 33 U.S.C. §933(b). See Rodriguez v. Compass Shipping Co., Ltd., 617 F.2d 955, 960-61 (2d Cir. 1980).

[4] Indeed, the Supreme Court noted that in amending the Act in 1972 Congress recognized the importance of adjusting the role played by "longshoremen's lawyers, who were found to have been

the primary beneficiaries of third-party actions in the past." Id. In the peculiar situation presented here, the longshoreman's lawyer will be the only beneficiary of this third-party action.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of January, one thousand nine hundred and eighty-two.

Present:

HON. JON O. NEWMAN,
HON. AMALYA L. KEARSE,
Circuit Judges
HON. WARREN W. EGINTON,
District Judge

SALVATORE INCORVAIA,

Plaintiff-Appellant,

-v-

#81-7099

HELLENIC LINES, LTD.,
"Grigorios-C-IV"

Defendant-Appellee.

United States Court of Appeals, Second Circuit, Filed Jan. 5, 1982, A. Daniel Fusaro, Clerk

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro, Clerk

by Arthur Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of March, one thousand nine hundred and eighty-two.

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SALVATORE INCORVAIA,

Plaintiff-Appellant,

-v- No. 81-7099

HELLENIC LINES, LTD.,

"GRIGORIOS-C-IV,"

Defendant-Appellee.

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A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the defendant-appellee, Hellenic Lines, Ltd., "Grigorios-C-IV", and an amicus curiae brief having been

filed in support of the petition for rehearing and suggestion for rehearing in banc by counsel for Sea-Land Service, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed March 11, 1982
A. Daniel Fusaro, Clerk

UNITED STATES COURT OF APPEALS

----------X

SALVATORE INCORVAIA,

Plaintiff-Appellant,

-against-

HELLENIC LINES LTD.,

Defendant-Appellee.

----------X

Docket No. 81-7099

NOTICE OF MOTION

for Recalling of Mandate
and Staying Further
Mandate Pending Petition
for Certiorari

Motion by:
Zock, Petrie, Reid & Curtin
Edwin K. Reid
(212) 425-0310

Opposing Counsel:
Irving Bushlow, Esq.
(212) 625-1336

United States Court of Appeals
Filed
March 29, 1982
A. Daniel Fusaro, Clerk
Second Circuit

Has a request of opposing counsel for consent been refused? YES

Has service been effected? YES

Is oral argument desired? NO

Requested Return Dated: April 8, 1982

Date of Argument of appeal, if scheduled:

Judge or Agency whose order is being appealed:

Judges Newman, Kearse & Eginton

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? NO

Would expedited appeal eliminate need for this motion? NO

If no, explain why not.

Mandate already issued.

Brief Statement of the relief requested:

Recalling mandate issued March 18, 1982 after re-hearing denial and staying further mandate.

Previous requests for similar relief and disposition:

None

Statement of the issue (s) presented by this motion:

Should mandate be recalled and any further mandate stayed pending filing petition for certiorari?

Brief Statement of the facts:

Petition for re-hearing was denied March 11, 1982 so that a mandate was issued March 18, 1982. According to plaintiff-appellant's calculations, judgment currently stands at $8,956.79.

Summary of the argument:

Relief is permissible pursuant to Federal Rules of Appellate Procedure 26 (b) and 41 (b). Notice of re-hearing denial was received on March 15, 1982 and mandate issued three days later. During both periods the attorneys handling this appeal were actually engaged at trial.

Dated: 3/26/82

Edwin F. Lambert, Jr.
Attorney for Defendant-
Appellee

ORDER

It is hereby ordered that the motion be and it hereby is denied.

Dated: April 6, 1982

Jon O. Newman

Amalya L. Kearse

Warren W. Eginton

UNITED STATES COURT OF APPEALS
FILED
APR. 13, 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

SALVATORE INCORVAIA, :

Plaintiff, : 77 Civ.94

-against- :J. Neaher

HELLENIC LINES, LTD., :NOTICE OF APPEAL

"GRIGORIOS," :

Defendant. :

----------x

S I R S :

PLEASE TAKE NOTICE that plaintiff, Salvatore Incorvaia, appeals to the Court of Appeals for the Second Circuit, from the "amended judgment" of this court dated and filed December 31, 1980, which amended the judgment of this court dated February 15, 1979 and filed February 21, 1979, to the extent of directing the defendant Hellenic Lines, Ltd., to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the

recovery over the employer's compensation lien, said "amended judgment" having been made and filed pursuant to a memorandum and order of this court dated and filed on November 7, 1980 (Hon. Edward R. Neaher, District Judge), which denied the application of plaintiff's attorney for an order providing for the payment of said defendant to said attorney, against the recovery, of the sum of $6,252.50, plus disbursements in the sum of $856.86, totalling $7,109.36.

Dated: Brooklyn, New York

January 27, 1980

Yours, etc.,

IRVING B. BUSHLOW
Attorney for plaintiff
26 Court Street
Brooklyn, New York 11242

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed January 30, 1980
A. Daniel Fusaro, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

----------x

SALVATORE INCORVAIA, :

Plaintiff-Appellant, :Docket No.

-against- :81-7099

HELLENIC LINES, LTD., :

"Grigorios V-IV", :

Defendant-Appellee. :

----------x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that HELLENIC LINES, LTD., "Grigorios C-IV", the defendant-appellee above named, hereby appeals to the Supreme Court of the United States from the order denying the petition for re-hearing in banc entered in this action on March 11, 1982, after a decision of the United States Court of Appeals, Second Circuit, entered January 5, 1982, reversing a judgment of

the United States District Court, Eastern District, resulting in a judgment for the plaintiff.

This appeal is taken pursuant to 28 U.S.C. §1254.

Pursuant to U.S. Sup. Ct. Rule 28.5, 28 U.S.C. Rule 28, all parties required to be served have been served and counsel's names and addresses are listed below.

Dated: New York, New York
May 20, 1982

ZOCK, PETRIE, REID & CURTIN

By_____
Martin E. Coffey
Attorneys for Defendant-Appellee
Office and P.O. Address
19 Rector Street
New York, New York 10006
(212) 425-0310

TO:

Irving Bushlow, Esq.
Attorney for Plaintiff-Appellant
26 Court Street
Brooklyn, New York 11242

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO.
77 C. 94

SALVATORE INCORVAIA

v.

HELLENIC LINES LTD.,
"Grigorios C-IV"

JUDGMENT

FILED IN CLERK'S
OFFICE, U.S.
DISTRICT COURT
E.D.N.Y.
FEB. 21, 1979

This action came on for trial before the Court and a jury, Honorable Edward R. Neaher, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff has established his claim that the defendant shipowner

was negligent and that its negligence was a proximate cause of plaintiff's accident,

that the defendant shipowner did not establish its claim that plaintiff was himself negligent and that negligence was a proximate cause of the accident,

that plaintiff shall recover $5,000 for pain and suffering from August 28, 1974 to date;

that plaintiff shall recover nothing for future pain and suffering;

that plaintiff shall recover $3,050 for medical and hospital expenses;

that plaintiff recover $9,100 for lost earnings prior to March 16, 1975;

that plaintiff recover nothing for any future diminished earning capacity.

Dated at Brooklyn, New York, this 15th day of February, 1979.

_____
Clerk of Court

_____
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

SALVATORE INCORVAIA, : AMENDED

Plaintiff, :JUDGMENT

-against- :77 C-94 (ERN)

HELLENIC LINES, LTD., "GRIGORIOS-C-IV", :

Defendant. :

----------X

Filed in Clerk's Office, U.S. District Court, E.D.N.Y., December 31, 1980.

A memorandum and order of Honorable Edward R. Neaher, having been filed on November 7, 1980, denying plaintiff's attorney's application against the recovery for his fee and disbursements, directing Hellenic Lines to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien, and directing the Clerk of the Court to enter judgment accordingly, it is

ORDERED and ADJUDGED that plaintiff's attorney's application against the recovery for his fee and disbursement is denied; and that Hellenic Lines is hereby directed to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien.

_____
Clerk of Court

Dated: Brooklyn, New York
December 31, 1980

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Counter-Statement of the Questions Presented for Review

1. In a longshoreman's negligence action against a vessel owner, where (a) the stevedore services, while provided in the name of the vessel owner, are, however, regarded and treated by the vessel owner as being actually provided by another entity separate and distinct from the vessel owner - namely by, in the vessel owner's own words, "an independent contractor", who is also regarded and treated by the vessel owner as being, also in the vessel's own words, "the employer" of the longshoreman, and (b) the recovery in the action is insufficient to satisfy both (I) the lien of the attorney for the longshoreman, for his fee and expenses, and (II) the lien of the stevedore - "independent contractor" - "employer" of the longshoreman for its workmen's compensation payments, does the lien of the attorney have priority over the stevedore's lien?

Counter-statement of the case

Respondent, a longshoreman, was injured aboard a vessel owned by the petitioner, Hellenic Lines Ltd. (A4*, A 25).

Thereafter he brought an action against Hellenic Lines Ltd., as the owner of the vessel, for damages for his injuries, alleging that those injuries were due to Hellenic's negligence (A4, A25).

In its answer to respondent's complaint, Hellenic Lines stated (2a**) that it

> "Admits that it owned, operated and controlled the Grigorious C IV, except as to those parts of the vessel, her equipment, appliances and appurtenances which were under the super-

*"A", followed by a number, refers to pages of petitioner's Appendix, attached to petitioner's petition.

**Numbers, followed by "a", refer to pages of the Appendix attached to this brief.

vision, operation, direction and control of a stevedore, an independent contractor, the employer of plaintiff, who was stevedoring the vessel and supplied, furnished and maintained the equipment and gear used in the stevedoring operation and directed, supervised and controlled the method and manner of performance of the stevedoring work, including the work which the plaintiff was performing at the time of his alleged accident..." (underscoring supplied).

Respondent recovered a verdict in the amount of $17,150 (A4), on which judgment was entered (A 25, A53-55).

Prior to trial respondent had been paid $13,554.91 in workmen's compensation and medical benefits (A25), the amount or amounts being paid in the name of Hellenic Lines Ltd. (A4, A25), but in the capacity of "a stevedore", acting as "an independent contractor", who was "the employer" of respondent (2a ; A25).

Following entry of the judgment,

respondent's attorney asserted a lien against the recovery of $17,150, in the amount of $7,109.36, for his fee and disbursements, and applied to the court for an order directing Hellenic Lines to make payment, as a first charge against the judgment (A4, A26).

Hellenic Lines, however, asserted that its lien in the amount of $13,544.91 was a first charge against the judgment (A4, A25-26).

The District Court gave priority to the compensation lien, and awarded respondent's attorney the balance remaining after deducting the amount of that lien, $13,544.91, from the recovery of $17,150, which came to $3,595.09 (A5, A37, A56-A57).

Respondent appealed to the United States Court of Appeals for the Second Cir-

cuit from the amended judgment (A1).

The Court of Appeals reversed, holding that the lien of respondent's attorney has priority over the workmen's compensation lien (A4, A18). 668 F. 2d 650.

Correction or modification of the facts as stated in the opinion of the Court of Appeals and the memorandum order of the District Court

Various statements in the opinion of the Court of Appeals and memorandum order of the District Court do not appear to take cognizance of the fact that, as Hellenic Lines itself expressly acknowledged (2a), the stevedore services, while provided in the name of Hellenic Lines, the vessel owner, were, however, regarded and treated by Hellenic, as being actually provided by another entity, separate and distinct from itself - namely, in Hellenic's own words, "by an independent contractor", who was also regarded and treated by Hellenic as also being, again in Hellenic's own words, "the employer" of the respondent longshoreman (2a) - thus making Hellenic Lines as vessel owner and Hellenic Lines as stevedore two separate and distinct entities.

The failure of the District Court and Court of Appeals to take cognizance of said facts resulted in their both mistakenly treating Hellenic Lines as vessel owner and Hellenic Lines as stevedore as one and the same entity, and holding, as the Court of Appeals observed, in agreement with the District Court,

> "that the common fund rationale (Sprague v. Ticonic National Bank, 307 U.S. 161; opinion of the Court of Appeals, 668 F. 2d 650-651, citing Sprague, supra; see Valentino v. Rickners Rhederei, G.M.B.H., SS Etha, 552 F. 2d 406; 2d Cir., 1977, cited and discussed at 668 F. 2d, at p. 650) provides no support for priority of the attorney's lien when the shipowner and the stevedore are the same entity" 668 F. 2d. at p. 651 (underscoring and matter in parentheses supplied).

Illustrative of the statements in the opinion of the Court of Appeals and memorandum order of the District Court which do not take cognizance of

Hellenic's position that Hellenic as vessel owner and Hellenic as stevedore were and are two (2) different and distinct entities,/are the following:

but treat them as the same entity,

> ".... This case, where the shipowner and stevedore are the same entity ....".(Opinion of the Court of Appeals, A5, latter half of page).
>
> "....The shipowner and the stevedore are the same entity".(Opinion of the Court of Appeals; A7, last two lines).
>
> ".... The identity between the vessel owner and stevedore..." (Opinion of the Court of Appeals; A7; center of page).
>
> ".... in this case the shipowner is also the stevedore." (Opinion of the Court of Appeals; A13).
>
> ".... The shipowner and stevedore are the same entity." (Opinion of the Court of Appeals; A14, center of page).
>
> ".... Hellenic's decision to perform its own stevedoring services...." (Opinion of the Court of Appeals; A15).
>
> "....The shipowner acts as its own stevedore..." (Opinion of the Court of Appeals; A16).

".... The stevedore and the vessel owner are the same ...." (Opinion of the Court of Appeals; A17).

".... Hellenic, as stevedore ...." (Opinion of the Court of Appeals; A17).

"....Hellenic's preference not to contract for stevedoring services." (Opinion of the Court of Appeals; A18).

".... The defendant vessel owner was also plaintiff's employer." (Memorandum order of District Court; A26; first complete par., first sentence).

".... the self-insured vessel employed the longshoreman ...." (Memorandum order of District Court; A26).

".... Hellenic Lines, as employer...." (Memorandum order of District Court; A33).

".... The vessel owner is also employer...." (Memorandum order of District Court; A34).

ARGUMENT

I

THE PETITION FOR A WRIT SHOULD BE DENIED

While it is true that this Court has never passed upon the question presented in this case, set forth at pp. 1, supra, nevertheless, as the Court of Appeals observed (668 F. 2d, at p. 651; rt. hd. col.),

> "Though the issue before us differs from the issue in Bloomer (Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74, 100 S. Ct. 925, 63 L. Ed. 2d 215; 1980), we think the Supreme Court's approach to the problem, and particularly its analysis of the legislative history of the LHWCA, leads to a conclusion that the compensation lien applies only to the longshoreman's net proceeds from the negligence suit, after deduction of litigation expenses and a reasonable attorney's fee" (matter in parentheses supplied).

See pp. 651-652 of 668 F. 2d for exposition of this court's "approach

to the problem, and particularly its analysis of the legislative history of the LHWCA."

Except for the fact that the Court of Appeals mistakenly treated Hellenic as vessel owner and Hellenic as stevedore as one and the same entity - when they were and are, as Hellenic acknowledged, two (2) separate and distinct entities - with the result that the Court of Appeals, like the District Court, upon the basis of that mistaken premise, erroneously held that the common fund rationale provides no support in this case for priority of the attorney's lien (668 F. 2d, at p. 651) - except for that fact, the opinion of the Court of Appeals fully and completely catalogues the reasons why, as it concluded, the attorney's lien in the case at bar has priority over the stevedore's lien.

Those reasons, we respectfully submit, constitute in effect an impressive armamentarium of compelling arguments why the petition for a writ should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING B. BUSHLOW
Counsel of record for
respondent

Appendix

Excerpt from answer of Hellenic Lines in the District Court to respondent's complaint (par. "3" of answer)

Admits that it owned, operated and controlled the Grigorious C IV, except as to those parts of the vessel, her equipment, appliances and appurtenances which were under the supervision, operation, direction and control of a stevedore, an independent contractor, the employer of plaintiff, who was stevedoring the vessel and supplied, furnished and maintained the equipment and gear used in the stevedoring operation and directed, supervised and controlled the method and manner of performance of the stevedoring work, including the work which the plaintiff was performing at the time of his alleged accident..." (underscoring supplied).

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FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2258

IN THE

Supreme Court of the United States

October Term, 1981

SALVATORE INCORVAIA,

Respondent,

- against -

HELLENIC LINES LTD.,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF SEA-LAND SERVICE, INC. IN SUPPORT OF THE PETITION OF HELLENIC LINES LTD. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 81-2258

Supreme Court of the United States

SALVATORE INCORVAIA,

Respondent,

- against -

HELLENIC LINES, LTD.,

Petitioner.

CONSENT TO FILING OF BRIEF *AMICUS CURIAE* BY SEA-LAND SERVICE, INC.

The undersigned, attorneys of record for petitioner Hellenic Lines Ltd. and respondent Salvatore Incorvaia in the captioned proceeding, hereby consent to the filing of a brief *amicus curiae* by Sea-Land Service, Inc. in support of the petition of Hellenic Lines Ltd. for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
July 9, 1982

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No. 81-2258

IN THE

Supreme Court of the United States

October Term, 1981

SALVATORE INCORVAIA,

Respondent,

- against -

HELLENIC LINES LTD.,

Petitioner.

BRIEF *AMICUS CURIAE* OF SEA-LAND SERVICE, INC. IN SUPPORT OF THE PETITION OF HELLENIC LINES LTD. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF AMICUS CURIAE

Amicus Curiae, Sea-Land Service, Inc., is the largest American flag owner and operator of ocean-going merchant vessels. In the port of New York its terminal operations, including stevedoring, are performed by employees of Sea-Land Service, Inc.—the same corporate entity which owns or bareboat charters the Sea-Land fleet of vessels. As an employer of waterfront labor it is liable in its stevedoring capacity to its longshoremen employees for workmen's compensation benefits under provision of the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA" or "the Act") in the event of injury aboard ship in the course of covered employment (33 U.S.C. § 901 *et seq.*, § 907, § 908). As shipowner or operator it is also potentially liable to longshoremen for damages under the Act's § 905(b) "as [if] a third party," despite the receipt of compensation and provision of the Act's § 905 that liability for benefits shall be the exclusive liability of an employer under the Act.[1]

1. This right of a longshoreman employed by a corporation which is both an employer under the Act and the "vessel" described in LHWCA

Sea-Land Service, Inc. (as was petitioner) is largely self-insured with respect to both its liability under the Act as an employer (stevedore) for LHWCA benefits and as a § 905(b) "vessel" (shipowner) for damages. By adopting the dual capacity once shared by Hellenic Lines Ltd. as the "vessel" and as an "employer," Sea-Land Service, Inc. has in the past and will in the future frequently face suit by its longshoremen/employees who, before institution of suit under § 905(b), have received and often exhausted, (as we believe is the case with *this* plaintiff/respondent), benefits available under the Act. This being so, Sea-Land Service, Inc. has an important interest in a determination by this Court of the correctness of the result achieved by the Second Circuit Court of Appeals.

By virtue of that Court's decision, petitioner, *solely* as a result of its dual capacity, is responsible for about half the fee and all litigation expenses said to be owed by the longshoreman to his attorney and as a result must pay *more than* the *higher* of the possibly concurrent, but never cumulative, liabilities of such dual status "employer/vessel"—compensation benefits under the Act's §§ 907 and 908, or that sum the trial jury found to be plaintiff's damages in suit under LHWCA § 905(b).

STATEMENT OF THE CASE

Salvatore Incorvaia, a longshoreman employed by Hellenic Lines Ltd., sustained personal injuries aboard the vessel, "GREGORIOUS-C-IV" on August 28, 1974 at 57th Street Pier, Brooklyn, New York ("complaint", 6a[2]) as a result of which "prior to trial" (27a) he received compensation benefits under the Act's §§ 907 and 908 amounting to $13,554.91. At the time of

§ 905(b) to sue his employer despite receipt of workmen's compensation is a codification, in altered form, of the former right of longshoremen employed directly by shipowners to sue their employers on account of vessel unseaworthiness established by this Court in *Reed* v. *S/S YAKA*, 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967). See, *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

2. References followed by the letter "a" refer to pages in the Joint Appendix prepared for the appeal to the Second Circuit Court of Appeals.

this longshoreman's injury, the vessel was admittedly "owned, operated and controlled" by petitioner Hellenic Lines Ltd. (8a), his employer. Suit was filed in the United States District Court, Eastern District of New York, on January 14, 1977, 28½ months after the occurrence of injury.

The case was called for trial before the Honorable Edward R. Neaher and a jury of six on February 6, 1979 and continued on February 7th, 12th, 13th and 15th, 1979 (1a-2a) at which time the jury returned a verdict in respondent's favor in the total amount of $17,150[3], a sum but $3,595.09 greater than compensation benefits previously received. On the basis of the jury's verdict the district court apparently entered an "original judgment" (13a-14a) on February 15, 1979 for plaintiff in the amount of the (unstated) sum of the damage awards made by the jury, without allowance for compensation benefits previously received.

Plaintiff/respondent did not, however, either collect the amount of the judgment or attempt to enforce any part of it. Instead, by letter dated November 30, 1979, 9½ months after entry of judgment, the attorney for plaintiff wrote to the attorneys for defendant (40a (1)) insisting that he was "entitled to . . . [his] . . . fee plus expenses," not from his client, the injured longshoreman, but from petitioner, the vessel/employer. Respondent's attorney further proposed that after he had recovered his fee ". . . then the compensation lien is to be paid and if (sic) there is anything left over it will go to the plaintiff." In the same letter respondent's attorney concluded that his "fee in this matter is (sic) pursuant to the Appellate Department (sic) [Supreme Court of the State of New York, Appellate Division, Second Department] sliding scale and it amounts to $6,252.50," a sum representing 36.46% of the amount of the total jury award.

On November 30, 1979 respondent's attorney also requested that the vessel/employer pay respondent's "litigation expenses"

3. The jury returned a special verdict awarding plaintiff sums for past lost wages, past pain and suffering and medical expenses *only*. In short, the jury found that plaintiff had *not* sustained any permanent injury (13a).

of $856.86 or, in total, the sum of $7,109.36. That is, the attorney for the longshoreman/plaintiff claimed to be entitled to expenses and his full "sliding scale" percentage fee, determined pursuant to contingent fee retainer agreement between him and his client, applied, *not* to the $3,595.09 excess of the verdict over previously paid compensation benefits, but to the amount of the "original judgment."

What the retainer agreement provides in way of disposition of "recovery" is not part of the record. It is, however, believed that the agreement between respondent and his counsel allows the same distribution of "proceeds" as did the retainer discussed by the district court in *Valentino* v. *Rickners Rhederei, G.m.B.H.*, 417 F. Supp. 176 (E.D.N.Y. 1976), aff'd, 552 F.2d 466 (1977) a case in which that plaintiff/longshoreman was represented by the same attorney. In *Valentino, supra* (417 F. Supp. at p. 177) the district court observed that the retainer agreement provided for a percentage attorney's fee and expenses "without deductions for liens."[4]

In its answer to plaintiff's complaint petitioner pleaded payment of workmen's compensation as an affirmative defense to plaintiff's claim for damages "as a set-off and/or counterclaim against or credit against any recovery of plaintiff against defendant for (sic) all sum paid to plaintiff as compensation and medical expenses" (9a).

Treating petitioner's prior payments of compensation benefits as an alleged lien on the "proceeds" of suit (said to be $17,150 despite this affirmative defense); and because the $3,595.09 excess was insufficient to fully satisfy the percentage fee claim if calculated "without deduction for lien;" on February 13, 1980 respondent moved for an order "providing for the payment by the defendant to Irving B. Bushlow, as attorney for plaintiff the sum of $6,252.50 plus the disbursements in the sum of $856.86." On

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4. As Judge Weinstein noted, that retainer agreement in pertinent part provided: ". . . such percentage shall be computed on the net sum recovered after deducting taxable costs . . . But for the following or similar items, there shall be no deduction in computing such percentages: liens . . ." *(id.)*

November 7, 1980 this motion was denied by Memorandum Order (27a-36a), *Incorvaia* v. *Hellenic Lines Ltd.*, 502 F.Supp. 280 (1980). On December 31, 1980 an "amended judgment" (37a-38a) was entered directing Hellenic Lines "to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien (sic)" (37a-38a). Respondent appealed and on January 5, 1982 the Court of Appeals reversed, holding that the attorney's lien for service and litigation expenses had "priority" over what was characterized as the "lien" of the employer/shipowner for compensation benefits previously paid. A petition for rehearing of the Court of Appeals' decision was denied on March 11, 1982.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Remanded to the district court for "entry of a judgment consistent with this opinion" (668 F.2d at 653) the decision of the Second Circuit Court of Appeals will achieve a result by virtue of which: (1) Salvatore Incorvaia gets *nothing* as a result of his "third-party" action except freedom from liability for disbursements and theoretical claim of fee by his attorney; (2) the attorney, whose efforts conferred no benefits upon anyone but himself, is rewarded with a fee based on the retainer agreement percentage applied to an essentially empty verdict and (3) petitioner, the vessel/employer in dual capacity, is required to pay more than its liability for all of plaintiff's damages assessed by the jury, or its obligations for compensation as determined by the United States Department of Labor, Office of Worker's Compensation Programs. Hellenic Lines, Ltd., instead of paying plaintiff's damages ($17,150) subject to *the defense of payment* to the extent of compensation benefits previously received on the grounds that in *no* event does any section of the Act allow the third-party action to result in a "double recovery" for a compensated employee or an employer's liability for an attorney's fee, is required to pay $13,554.91 in compensation plus the attorney's claim for fees and disbursements of $7,109.36 or a total of $20,664.27. That is, the

vessel/employer, for the privilege of being sued and for no reason other than to benefit an attorney, pays the *additional* sum of $3,514.27 as a result of a suit which subsequent events proved should never have been brought; while the district courts, at no inconsiderable expense to the public, are required to provide a forum for proceedings which by virtue of the vast increase in level of benefits provided by the 1972 Amendments to the LHWCA (86 Stat. 1262) are known or profoundly suspected "prior to trial" to likely result in no benefit to the injured employee.

The result of the Second Circuit Court of Appeals' decision is of course to create "value" in longshoremen's § 905(b) "third-party" suits by allowing assessment of a significant attorney's fee against the losing shipowner even in a case where by reason, for example, of the longshoreman's contributory negligence, or availability of argument that his injury resulted only in aggravation of a pre-existing progressive condition, a verdict less than the sum of compensation previously paid is absolutely assured.

In addition, the result establishes a clear conflict of interest between such longshoreman and his attorney, since whatever the amount of the benefits previously paid, he is entitled to share in a recovery by settlement upon agreement of the employer to "waive" a substantial part of its so-called "lien." This conflict encourages not only the filing of suits where no realistic prospect exists of a verdict in excess of benefits previously paid, but ensures that such case will proceed through trial, in order that the attorney can obtain payment of a fee based on an empty judgment *greater than* that which would be realized from application of the retainer percentage to an "excess" artificially created by a settlement designed to save the shipowner trial expenses and its attorney's fees.

In *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980) this Court decided the question of the liability of the insurer of an independent contractor stevedore for a longshoreman's attorney's fee where the sum recovered was large enough after deduction of the lien to allow the attorney to take his full retainer percentage from the excess. In holding that the stevedore's insurer was not

liable *pro rata* for lien recovery despite the fact that the attorney's efforts *had* created a "common fund" for the benefit of the longshoreman and the insurer, this Court seemingly decided three issues: (1) that it would be entirely inappropriate, given the vast increase in the level of compensation benefits available to longshoremen since the 1972 amendments, to allow a class of plaintiffs guaranteed substantial recoveries irrespective of fault to "receive a greater sum than would be possible in an ordinary suit for damages" (445 U.S. at p. 80). That is, this Court refused to increase the net recovery of LHWCA employees of benefits and damages combined to more than an ordinary litigant's recovery of damages less standard contingent fees by requiring the employer or its insurer to shoulder part of the longshoreman's attorney's fee burden; (2) that Congress in enacting and amending the LHWCA provided no right in favor of a covered employee to compel his employer to pay a fee for "lien" recovery, and (3) that the purposes of Congress in enacting the 1972 Amendments—to discourage often needless litigation and to conserve industry assets required to pay the more generous benefits now available—made judicial invention of such right particularly inappropriate (445 U.S. at p. 85).

In *Bloomer, supra* the majority opinion responded to Justice Blackmun's suggestion in dissent that the Court's decision would, in the verdict-less-than-lien circumstances presented in *Valentino, supra,* require the employee to "disgorge part of his compensation payments" (*id.* at p. 96) by noting (445 U.S. at 86 n. 13) that the respondent "does not challenge" the approach adopted in *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461, 463-464 (SDNY 1952), aff'd on op. below sub nom., *Fontana* v. *Grace Line Inc.*, 205 F.2d 151 (2d Cir. 1953) making expenses of suit, including attorney's fees, "the first charge" on the third-party recovery. Although unwilling to sanction a result by virtue of which an amply or even generously compensated longshoreman would do better as a result than an ordinary litigant, the majority

was not prepared to deny a LHWCA employee his full compensation whatever the outcome of his third-party action. Thus, this Court added:

> We do not today address the Valentino situation, and . . . nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses. (*Bloomer, supra*, 45 U.S. at 86, n. 13).

Three things are seemingly clear:

(1) Whenever the verdict is greater than or equal to the sum of the compensation lien and the attorney's fees, a longshoreman's attorney's fee is the first charge on the excess, and the "stevedore must be paid in full before the longshoreman receives anything." *Valentino, supra*, 552 F.2d at 470 n.5. As a result, a longshoreman is alone responsible for his attorney's fee and must, if necessary, pay the last cent of any excess in satisfaction of this obligation.[5]

(2) Whenever the verdict is less than the lien plus attorney's fees, guidance can no longer be had by reference to the recovery of the theoretical ordinary litigant. In this circumstance, a plaintiff such as Mr. Valentino perforce does better than a plaintiff not entitled to compensation, not because such longshoreman recovers *anything* from his third-party suit (he does not) but because he is not required to disgorge any part of his compensation benefits in order to pay his attorney a fee.[6]

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5. As an example, a longshoreman recovering damages of $15,000 subject to a $10,000 lien gets nothing for his third-party action whenever the retainer fee percentage is 33⅓%. However, he does as well as an ordinary litigant because he, of course, keeps the compensation previously paid ($10,000) and as a result of his combined remedy receives, as would any uncompensated injury case plaintiff who had agreed to the same fee arrangement, 66⅔% of his damages. *Most importantly*, he does no better as a result of compensation, which would be truly an anomalous result given the generosity of LHWCA benefits.

6. Mr. Valentino keeps his $15,000 (the approximate amount of the lien in his case) because his right to compensation is concurrent with his right to damages. An ordinary litigant would get but two-thirds of the $5,000 *Valentino* verdict less disbursements. In the view of the Second Circuit Court of Appeals, Mr. Valentino's employer, for whose benefit

(3) Judicial interpretation of § 905(b) of the Act must, as best possible, "treat equally" longshoremen such as respondent who are employed directly by shipowners and those who are employed by independent contractors. Moreover, dual status employers such as petitioner must be treated equally with respect to their "third-party" liability as independent LHWCA employers. *Edmonds* v. *Compagnie Generale Transatlantique, supra* at p. 266.

The analysis of the Court of Appeals in the case at bar proceeded on two assumptions: (1) that *Valentino* survived *Bloomer*, and (2) that its applicability in any "deficiency" situation, even in suit involving a dual status employer/vesssel owner, was absolutely required by the "equal treatment" mandate. While this Court's *Bloomer* decision rejected the "common fund" analysis of *Valentino* in those cases where the verdict is equal to or greater than the sum of the lien and attorney's fee, the majority's reference to *Valentino* does suggest agreement with that holding in a "deficiency" situation. Thus, although the Court of Appeals obviously did not assume the continued vitality of *Valentino* without basis, it perhaps overlooked the necessary effect of this Court's decision in *Bloomer* on the conceptual basis of *Valentino*.

After *Bloomer*, it is clear that a longshoreman is not entitled to have his employer shoulder part of the third-party suit attorney's fees *merely* because that suit has generated a fund which benefits the employer. If *Valentino* is valid an additional fact must obtain under the rule of that case before a LHWCA employer must share payment of the employee's attorney's fee: the fund must be so small that the longshoreman, to pay his attorney, would have to draw on the amounts received by him in compensation benefits. This result can of course only be seen as acceptable *because* the employer has been benefited, not penalized, by the bringing of suit.

Judge Kearse's concurring opinion of the Court of Appeals recognized that application of *Valentino* to a dual status employer

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recovery in the third-party suit was had, was required because of "common fund" considerations to pay the fee and disbursements of Mr. Valentino's attorney.

produced on its face an "inequitable result" (688 F.2d at 653) for reason of the fact that this petitioner not only received no benefits from the suit; but was, rather, in its vessel-owning capacity, required to pay respondent's damages exceeding the compensation benefits previously paid and, in addition, a part of his attorney's fee.

Valentino may, however, be based on the unsound assumption that in the event of a shortfall in the verdict *either* the longshoreman or the stevedore owes the attorney a fee corresponding to the retainer percentage applied to the face amount of the verdict — even in this the extreme case — where such verdict is empty with respect to the interests of the longshoreman *and* stevedore. Thus, it may be that the Court of Appeals felt compelled to apply *Valentino* for fear that Mr. Incorvaia, unlike Mr. Valentino, could be liable to his attorney for that portion of the fee not covered by the verdict. This concern, while not entirely unfounded in theory, is in fact easily resolved without need to resort to a most drastic result requiring a losing party (petitioner) to pay the victor's attorney's fees.

What may have been the court's concern is obviated if it is recognized that an attorney's fee is *not* immutable and that the federal courts have inherent power to fix an attorney's fee in §905(b) cases.[7] In the *Valentino* situation, where the employer *had* received benefit from the suit, there was no reason perceived

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7. In this respect, a federal court judge should not have less power than a deputy commissioner, U.S. Department of Labor who is empowered under § 933(e)(1)(A) of the LHWCA to assess a "reasonable attorney's fee" where the third-party suit is brought in the name of the employer. The existence of this power is of course perfectly obvious from the fact, as the attorney for respondent acknowledges, that his fee is based on an agreement approved by the courts of the State of New York. Freedom of contract arguments *absolutely* do not lie with respect to contingent fee retainer agreements which are subject to the closest scrutiny by the courts. Thus, every case (many of which achieved diametrically opposing results) listed in petitioner's brief on the issue of disposition of proceeds amongst the employer, employee and his attorney involves intervention by the federal courts, and a determination of what fee was appropriate and in what order it should be paid. We would submit that it was the law that changed; not the terms of the retainer agreement. What is a "lien" and what are "similar items" as

to *sacrifice* the attorney's fee or any part of it.[8] But irrespective of the wisdom of *Valentino* when applied to a case involving an employee of an independent contractor, in a "dual status" employer § 905(b) suit, where the verdict is less than the amount of benefits paid plus attorney's fee *and* the attorney's effort confers no benefit on *either* the longshoreman plaintiff or his employer, there more surely can be no just reason for allowing the attorney to recover from *either* his client or the dual status employer whatever portion of his fee remains unsatisfied after reduction of the verdict by the amount of compensation benefits paid by the employer. The "equal treatment" mandate applies to LHWCA employers, and employees. It does not apply to attorneys.

Moreover, such result does *not* conflict with the "equal treatment" requirement since under this arrangement, Mr. Incorvaia, like Mr. Valentino, recovers nothing and "disgorges" nothing in payment of a fee which is not earned. Finally, were there any "inequality" of treatment, such as requiring only Mr. Incorvaia to pay his attorney's disbursements, such would be completely justified on basis of the *unquestionable* inequality of their employers' position in context of the third-party suit. The interest of an independent contractor LHWCA employer in the third-party suit is at least in the nature of a lien; and it is "fundamental that a lien does not exist without a right or obligation to support it." *Allen* v. *Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975). See also, *LeBlanc*

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that term and phrase appears in the subject agreement; and when either should or should not count in calculating a contingent fee is a matter of law, not private contract.

8. Under *Valentino*, in a high lien case, plaintiff's attorney is encouraged to prefer his fee interest to the interest of his client in accepting a modest settlement (where some or all of the lien has been "waived"). The case at bar is an example of a situation with such potential. Petitioner, in order to save its trial expenses, might have been willing to offer a sum corresponding to what events proved to be the excess and a waiver of its "lien" in settlement. If such offer was accepted, Mr. Incorvaia would have received about $2,400 — twice the fee which would have been earned by his attorney. It is a curious result indeed that an attorney who tries a case and confers no benefit on his client does better, for himself, than one who settles and obtains an additional recovery for his client.

v. *Petco, Inc.*, 647 F.2d 617, 620 (5th Cir. 1981, dissenting op. Spears, J.). In short, the independent employer may, as a result of the third-party suit, recoup benefits already paid and obtain *relief* from its statutory compensation liability.

It is, however, entirely imprecise and inappropriate to characterize a dual status employer such as petitioner as a "lienor." Petitioner cannot realistically be seen as obligated to pay to itself in its stevedoring capacity that part of a judgment in a § 905(b) action owed in its shipowning capacity which represents compensation benefits previously paid. A dual status employer raises issue of its previous compensation payments in answer to the complaint not to assert a lien but in order to avoid *cumulative* liability for compensation and damages. It is the "entire scheme of the Act" which proscribes a "double recovery," a result which was achieved (and more) by implication of the stevedore's lien. *Fontana, supra*, 106 F. Supp. at 463. It is, therefore, clear that petitioner's interest can only be correctly seen as a right to assertion of that proscription in respondent's §905(b) action by affirmative defense of payment of compensation benefits.

Thus, unlike *Valentino*, the instant suit did not present an issue of determining priorities as between two competing lienors. Instead, it raised the question whether, under circumstances where no "common fund" can possibly be said to have been created, petitioner, the losing party, should nevertheless be required to pay the attorney's fee of the "successful" longshoreman. So understood, the holding of the Court of Appeals represents a clear violation of the so-called "American rule", identified by this Court in *Alyeska Pipeline Serv.* v. *Wilderness Soc.*, 421 U.S. 240 (1975), as to when a successful litigant may recover attorney's fees.[9]

9. It also conflicts with the applicable decisions of the New York courts which have interpreted the New York workmen's compensation law to which this Court in *Bloomer, supra* (at 445 U.S. 88, n. 15) referred for guidance. The LHWCA was adapted from the New York State statute when originally enacted in 1927 and the New York Act did not allow for attorney's fee apportionment. After the abandonment in New York of the common law rule proscribing contribution between joint tortfeasors (*Dole* v. *Dow Chemical Corp.*, 30 N.Y.2d 143 (1972)) followed enactment in 1975 of §29(1) of the New York Workmen's

Being "in conflict with applicable decisions of this Court" (Sup.Ct.R. 17(1)(c)), the Court of Appeals' decision should be reviewed by this Court. Moreover, the decision of the Court of Appeals has truly "departed from the accepted and usual course of judicial proceedings" (Sup.Ct.R. 17(1)(a)), in needlessly fashioning a result so at odds with the Congressional intention in enacting the 1972 Amendments: to discourage third-party actions by substituting a compensation remedy of sufficient generosity so as to make the §905(b) suit typically redundant—save, in the apparent view of the Court of Appeals, for the interests of the maritime bar whose so expensive participation formerly in the process of securing just compensation for LHWCA employees the 1972 Amendments were specifically designed to curb.

Congress achieved the result sought. This case proves the *typical* futility of the longshoreman's third-party action and all that remains is for this Court to make plain the important implication which follows that fact—where a LHWCA employee does as well as an ordinary litigant by recourse "before trial" to his right to compensation irrespective of fault, the "trial balloon" this third-party case represents, once again testing *only* the question whether the Amendments have worked well enough, should *not* proceed at risk of the employer; particularly on terms designed as best possible to preserve first the attorney from the impact of a "too low" verdict.

It is, regrettably, not too much to say that the Court of Appeals' decision, acknowledged in the concurring opinion as one which "produces an inequitable result" (668 F.2d at 652) in fact produces a potentially alarming one. To all but those initiated in the complexity of longshoremen's personal injury litigation,

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Compensation Law (McKinney's Consol. Laws of New York) which permits a plaintiff to apply to the court for apportionment of attorneys' fees between himself and a compensation insurer. There will, however, be no apportionment where the "lienor," by being impleaded, is made a party against whom judgment is recovered. *Meyers* v. *Cornell University*, 97 Misc.2d 195 (3rd Dept. 1978), 410 N.Y.S.2d 986 (1978).

which the Court of Appeals aptly observed "generates an apparently limitless array of legal issues" (668 F.2d 650), the decision seems an inexplicable example of inappropriate preference of litigation and lawyers.

It is nonetheless a most anomalous result indeed that a LHWCA dual status employer within the jurisdiction of the Second Circuit Court of Appeals must pay for the privilege of being sued in the form of obligation to pay its employee's attorney's fees and expenses, but *only* when the result sought by Congress is achieved: where the generosity of benefits is proven to have withdrawn *all* benefit to the longshoreman from his third-party suit. Surely Hellenic Lines Ltd., formerly a full participant in a stevedoring industry which now provides workmen's compensation benefits to its employees on a near unprecedented level of generosity, should not be penalized for having enhanced the more dignified compensation remedy as a result of judicial encouragement of near-champertous §905(b) actions which are tried for the benefit of attorneys only.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be reversed and the order of the District Court reinstated. Amicus Curiae most respectfully submits that it would be appropriate for this Court to consider reinstating the District Court's order by summary disposition as is permitted by Sup.Ct.R. 23. We would suggest, as Judge Neaher perceived, that the correct solution lies not in weighing the issue of "lien" priority but in evaluating the question of what an attorney should appropriately earn for services in a case which he knows to be heavily encumbered (and happily so from his client's point of view) by the fruits of the 1972 Amendments.

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